No. 13,866

United States
COURT OF APPEALS
for the Ninth Circuit

SOLON B. CLARK, JR. and GERALDINE A. CLARK, husband and wife, and RELATED CASES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLANTS

On Appeal from the United States District Court for the District of Oregon.

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Portland, Oregon,
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OPINIONS BELOW

The District Court rendered two opinions (R-15(1-9) and R-16(1-25)), the first opinion being dated September 8, 1952, and reported in *13 F.R.D. 342,* and the second opinion being dated October 23, 1952, and reported in *109 F. Supp. 213.* Its Findings of Fact and Conclusions of Law are not officially reported. Due to the fact this Court has waived the printing of the record herein, the appellants call to the attention of the Court the fact that the Pre-Trial Order is set forth practically in full in *13 F.R.D, pages 346 to 406 inclusive.*

JURISDICTION

These are actions for recovery of damages from the United States of America under the Federal Tort Claims Act. The cause of action arose on May 30, 1948, being the date of the Vanport flood, which occurred in Multnomah County, Oregon. These actions were filed in the United States District Court for the District of Oregon within two years after the right to a cause of action arose. Jurisdiction over these actions existed in the District Court under 28 U.S.C. 1346 (b). Judgment in favor of the appellee and against the appellants was entered January 29, 1953 (R-19). Notice of Appeal was filed March 27, 1953 (R-20). Jurisdiction of this Court to hear and determine this appeal is conferred by 28 U.S.C 1291.

QUESTION PRESENTED

Whether or not the appellants are entitled to recover for the damages they suffered, from the appellee, the United States of America, under the provisions of the Federal Tort Claims Act.

STATEMENT

The parties stipulated that twenty cases be selected out of more than 700 cases on file in the District Court and that these twenty cases be consolidated for trial for a determination on the sole issue whether or not the United States was liable for damages (P.O., Pretrial

Order 2). All other cases involving this same matter on file in the District Court, by agreement between all the parties were bound by the foregoing stipulation (R. 11).

Many of the pertinent facts were stipulated (P.O. 3-82 a) and may be summarized briefly as follows:

All of the appellants resided in Peninsula Drainage District No. 1, being the site of Vanport and situated in Multnomah County, Oregon (P.O. 5). The general boundaries of Peninsula Drainage District No. 1 are: on the north, Oregon Slough; on the south, Columbia Slough; on the west, lowlands subject to flood; on the east, another drainage district known as Peninsula Drainage District No. 2. The boundary between Districts No. 1 and No. 2 is the highway fill known as Denver Avenue (P.O. 5). West of the westerly boundary of District No. 1 is land which the Columbia River floods during most high waters. Between this area and District No. 1 are two railroad fills, and a highway fill. One railroad fill supports the tracks of the S. P. & S. Railway Company, and the other supports the tracks of the Union Pacific Railroad Company. These two fills join and the tracks connect at a point approximately midway between Oregon Slough and Columbia Slough (P.O. 5).

The elevation within the district varies from six to thirty feet, and in the absence of protecting embankments much of it would be inundated during all flood stages of the river.

The north and south banks are protected by levies and these levies were improved and strengthened by the United States government pursuant to Section 5 of the

Flood Control Act of 1936, 49 Stat. 1590 (P.O. 11).

The western embankment consisted of a railroad fill known as the Union Pacific fill, which extended northerly from the Columbia Slough for a distance of approximately 3200 feet, to where it joined the fill of the S. P. & S. Railway Company. North of this point of junction, a single structure, consisting of the combined railroad fills and the highway fill, is between the flooded lands on the west and the district itself. It was this structure that failed on May 30, 1948 (P.O. 15).

The fill that failed was constructed between 1910 and 1918, the original of said fill being a trestle over a lake bed known as Smith Lake, which, between 1910 and 1918, was filled in by dumping material down through and over the trestle. The stringers of the trestle were removed but the pilings were not. The material that was used was of a sandy nature, but nothing more was known than that as to the materials used (P.O. 16). From the time the fill was completed in 1918 until the high water period of May, 1948, the fill never subsided, caved, or sloughed off (P.O. 17).

Immediately north of the previously described fill was the S. P. & S. fill, part of which also failed. This fill was built in the same manner as the previously described fill (P.O. 18).

The width of the break in the fills heretofore described was 590 feet, and occurred at a point where the fill had been constructed on the bottom of an arm of Smith Lake. The lake bottom consisted of the natural soil of the area, that is, sand and silt (P.O. 24).

On May 30, 1948, at the time of the break, the elevation of the water adjacent to the embankment that failed was 30.8 feet. Prior to 1918, when the fill was filled in, water could flow through the trestle into the district and as a consequence the fill was not subject to side pressure. Since 1918, up to the time of the break, there have been only three occasions when the elevation of the water exceeded 27 feet, namely, on June 12, 1921, 27.4; May 31, 1928, 27.6; and June 19, 1933, 27.7, the last elevation being the strongest test of water pressure on the side against the fill in question, since the time of its construction, and the elevation of the water at the time of the break being 3.1 feet higher than ever before (P.O. 25).

The land constituting Vanport, upon which the appellants resided, was acquired by the United States in a condemnation proceeding filed November 4, 1942, and the United States was the owner in fee of all the property in question from that date up to and including May 30, 1948 (P.O. 31). Vanport was built by the Federal Public Housing Authority (P.O. 30) and, by an instrument designated as a master lease, the management of the project was turned over to the Public Housing Authority of Portland (P.O. 32). On May 30, 1948, a total of 5,270 units in Vanport were occupied, and approximately 15,810 persons lived in Vanport (P.O. 51).

The United States Weather Bureau accurately predicted river stages (P.O. 53).

On June 7, 1894, the water elevation of the Columbia River was 34.2 feet, and on June 24, 1876, the Columbia

River reached an elevation of 29.4 feet (P.O. 55).

On May 10, 1948, the President of the United States issued Executive Order No. 9957, effective as of noon on that day (P.O. 75), said order being effective until terminated on July 9, 1948, (P.O. 79); said order provided among other things that the possession, control and operation of the railroads, including the fill in question, were taken over by the appellee and the order specifically provided that the two railroads in question were conclusively deemed to be within the possession and control of the United States, *13 F.R. 2503.*

In addition to the foregoing stipulated facts, the following facts were proven conclusively:

All of the appellants were tenants of the United States of America on a month to month basis, and paying their monthly rental. These appellants were all damaged in that they lost personal property belonging to them, the reason for their loss being that they relied on assurances of safety, said assurances being that the dikes would hold and that if there were any danger to arise, they would receive ample warning. These assurances were given to the appellants by officials of the Housing Authority of Portland, newspaper accounts and over the radio (Tr. 28-62, 71-378).

The officials of the Portland Housing Authority, in giving these assurances of safety to the appellants and to the press and radio, relied on the advice given to them by the officials of the Army Engineers (Tr. 677, 678, 731, 736, 738-740).

The Army Engineers gave their official advice that the dikes were safe without any knowledge whatsoever as to how the fill, that gave way, was constructed or what materials were used in the fill (Tr. 335), and the only knowledge that the Army Engineers had at all as to the stability of the dike in question was its size and the length of time it had stood (Tr. 830-831).

In order to be able to give an opinion of any value as to whether or not a dike will withstand certain pressures, it is essential to know the height, width, materials used in construction, condition of the foundation upon which the dike is built, and the method of construction (Tr. 331, 429, 682-684, 1017, 1018). The Army Engineers in giving their opinion as to the safety of the dike in question had none of the above information, except its size (Tr. 830-831).

The Army Engineers, after the break, made an investigation as to the cause of the break. General Walsh testified that the investigation did not disclose the cause of the break (Tr. 334). This case was tried in August, 1951, over three years after the break, and Middlebrooks, a government witness and Chief of the Soil Branch, Office of the Chief of Engineers, testified that the United States Army Engineers were making an investigation of the cause of the break, but no final report had been made (Tr. 979-980).

As to the condition of the fill itself, which gave way, muddy water, described as being soupy and of chocolate color, had been running along the Vanport side of the dike (Ex. 199, pp. 9 and 22). The dike settled about

three days before the break for a distance of from 1500 to 2000 feet, and it settled about three or four inches (Tr. 380-382, 838). The reason for the settling was that the foundation in the fill was being saturated and softened (Tr. 383).

Also, about three days before the break, a crack formed on top of the fill where it broke, which was about sixty feet long and by the day of the break it had widened to about four or five inches (Tr. 383). The piling over which the dike was built contained decayed timbers (Tr. 384 and 559). Boils near the place of the break were discovered around 9:30 A.M. on the day of the break, but there was no one working on them (Tr. 873). The Vanport side of the fill which broke, was covered with briars, brush and cottonwood trees, making visual inspection impossible (Tr. 399 and 459).

At the time of the trial, six witnesses expressed an opinion as to the cause of the break. They were as follows:

1. Stanton, Vice-president and General Manager of the S. P. & S. Railway Company, that the cause of the break was a soft bottom and the hydrostatic pressure against the fill (Tr. 64).

2. Kinser, employee of the railroad and the control tower man, expressed the opinion that the fill was being saturated and softened (Tr. 383).

3. Hines, General Manager of the Metropolitan Water District of Southern California, testified that the cause of the failure could have been a foundation failure, that the base had become water logged, and become

more or less liquid, and suddenly went out, and that the cause of the failure could have been any unknown factor as to the internal part of the dike or the base (Tr. 437-438).

4. Suttle, the engineer for the Drainage District testified that the cause of the break was the soft mud underneath (Tr. 550).

5. Mockmore, head of the Department of Civil Engineering at Oregon State College, testified that there was a sufficient flow of water getting underneath to carry away some of the finer materials and leaving voids, so that pressure could get in these voids in a sufficient quantity to force the water on through to the incipient stage of a quickening condition, similar to quicksand (Tr. 695-696).

6. Philippe, Chief of Soils and Cryology, Branch of the Chief Engineers, testified that the materials on the riverward and landward side must have come from different sources and probably different in characteristics, and that the landward slope was more impervious, and as a result built up a sufficient head to blow the dike (Tr. 1009).

After the failure of the dike, Dibblee, Chief of the Service Branch of the Construction and Operations Division of the Portland office of the Corps of Engineers, made a recommendation that a soil investigation be made of the foundations under these dikes so that such information could be used to determine the necessity of constructing cutoff trenches and core walls, or the necessity of abandoning the dikes and creating entirely

new levees, and further reported on the necessity of enforcing the regulations which provide for the removal of all brush, trees, and high grass, from the levees, in order to remove the hazard to visual inspection of seepage spots. The errors and mistakes of the United States Army Engineers were recognized in this report (Tr. 956).

One of the duties of a district engineer is to prepare a manual for emergency flood control work and such a manual had been prepared for the Portland, Oregon, district, prior to May of 1948, and was in effect throughout the month of May, 1948 (Tr. 322-323). Said manual was Exhibit 64, and provided in part that the Army Engineers should disseminate information regarding the flood. There is not a copy of this exhibit available in Portland at the time of writing this brief, so it is impossible to quote this exhibit in its exact wording.

During the week preceding the break, the newspapers of the area and radio stations carried many articles to the effect that the dikes were safe and that ample warning would be given if any danger arose. These newspaper articles quoted the Army Engineers and the Portland Housing Officials' quoting of the Army Engineers (Exs. 417-431, inclusive).

As found by the Trial Court in its Finding of Fact No. 10 (Findings, 18, p. 6), the Housing Authority of Portland managed the City of Vanport in the interest of the Federal Public Housing Administration, which issued directives and had control of the policies relating to the renting, financial management and supposed welfare of

the inhabitants. This Housing Authority was a federal agency and, with respect to the management of Vanport, it was acting as an agency of the United States.

In spite of the foregoing stipulated facts, and the foregoing proven facts, the trial court entered a judgment in favor of the appellee on January 29, 1953, from which judgment appellants take this appeal.

STATEMENT OF POINTS TO BE URGED

1. That the District Court erred in finding and holding that the advice given by the Corps of Engineers of the United States was honest and competent.

2. That the District Court erred in finding that there was no negligence on the part of the Corps of Engineers of the United States and its employees or representatives.

3. That the District Court erred in finding that the Corps of Engineers of the United States had not assumed any obligation to be responsible for the safety of the Vanport residents and their property, and that no duty was imposed upon the United States by the activities of the Corps of Engineers of the United States.

4. That the District Court erred in finding that the seizure of the properties of the Spokane, Portland & Seattle Railway Company and the Union Pacific Railway Company, including the western embankment which failed, was a fiction of the flimsiest kind, and that the seizure did not, in fact, affect in any way the

ownership or control of the said railways or their properties, including the western embankment at Vanport.

5. That the District Court erred in finding that there was no negligence on the part of the Housing Authority of Portland and its agents or employees.

6. That the District Court erred in finding that the United States as owner of Vanport and as landlord of the residents of Vanport had no control over the premises leased to the Vanport tenants, including the appellants, and finding that the United States as landlord and owner of Vanport performed all duties owing from it to the Vanport tenants, including the appellants.

7. That the District Court erred in finding that the agents and employees of the United States and of the Portland Housing Authority assumed no duty, in connection with the flood situation, which they failed to discharge.

8. That the District Court erred in finding that the United States, its officers, agencies, and employees all acted with due and ordinary care in all things connected with the flooding and damaging of property of appellants.

9. That the District Court erred in finding that the responsibility for the safety of property belonging to the tenants at Vanport during the flood period, rested with the individual owners of the property and not with the United States.

10. That the District Court erred in finding that the 1948 Columbia River flood was an act of God.

11. That the District Court erred in finding that the appellants failed to prove any negligence or wrongful act or omission by any employee of the United States and that the appellants suffered damages on that account.

12. That the District Court erred in finding that the doctrine of res ipsa loquitur did not apply in this case.

13. That the District Court erred in finding that the appellants did not rely for the safety of their property on assurances by the United States, its agents or employees.

14. That the District Court erred in finding that the United States had no duty to protect appellants' property and that there was no evidence of negligence or of any wrongful act or omission on the part of any agent or employee of the United States and that the agents and employees of the United States during the flood period were acting in a period of public emergency and were exercising their discretion in that connection, and that no agent or employee of the United States assumed any duty in connection with appellants' property which was not discharged.

15. That the District Court erred in finding that the United States, its agents and employees was not negligent within the meaning of the Federal Tort Claims Act.

16. That the District Court erred in finding that the appellants assumed the risk that they might be damaged by flood waters and that as a consequence there was no liability on the part of the United States.

17. That the District Court erred in finding that the provisions of 33 U.S.C.A. 702 (c) applied to the issues involved in this action.

18. That the District Court erred in granting judgment herein in favor of the appellee and against the appellants.

SUMMARY OF ARGUMENT

The appellants urge that the trial court committed eighteen errors in its findings, which are set forth in this brief under the heading of Statement of Points to Be Urged. The appellants have grouped these claimed errors under four headings in their argument.

The first argument refers to points 1, 2, 5, 8, 11, 13 and 15 and may be summarized in that the officials of the Army Engineers and the officials of the Housing Authority of Portland, all agents and officials of the appellee, negligently made statements assuring these appellants that the dikes surrounding Vanport were safe. The negligence claimed with regard to these statements that the dikes were safe is that these statements were made recklessly and without any knowledge whatsoever as to the actual condition of the dike that broke. These appellants relied upon these statements made by the officials of the appellee and as a consequence suffered the damages complained of in these actions.

The second argument refers to points 3, 6 and 7 and may be summarized in that the appellee, the United States of America, was the owner in fee of the property

leased by these appellants from the appellee. The appellee owed to these appellants all of the duties owed by a landlord to a tenant, and did not fulfill its duties in that the dike broke and the appellants were flooded out and lost their property as a result thereof, which is the basis of this action. The appellants, as lessees of the government, only had control themselves of their individual apartments, while the landlord retained complete control of all the common areas, including the dikes.

The third argument refers to points 4 and 12 and may be summarized in that the United States government, the appellee herein, by reason of an executive order issued May 10, 1948, had complete possession and control of the dike which failed. And further, the doctrine of res ipsa loquitur applies in this case in that the western embankment which failed was in the exclusive possession and control of the United States, and the breaking of the same was an occurrence which in the ordinary course of things would not happen if those who had its control or management had taken proper care, and there was no participation on the part of the appellants and the appellants suffered damages, these being the requisite essentials which make the doctrine of res ipsa loquitur applicable.

The fourth argument refers to points 9, 10, 14, 16 and 17 and may be summarized in that the appellee raised certain defenses to these actions which were not tenable, the first defense being that of assumption of risk by the appellants. This defense can be of no avail to the appellee, because before that defense is available there must be knowledge by the party who is charged with the assump-

tion of risk, and this was not present in this case. The second defense was that the cause of the damage was an act of God. This was not applicable to the facts in this case because the flood was foreseeable in that the Columbia River had on two prior occasions reached higher heights, and further the actual cause of the damage was not the flood but the negligent statements of the officials of the appellee. The third defense was that the acts of the agents of the appellee were done in a period of public emergency, and this was not applicable because the emergency did not arise until the break of the dike, and the negligence which caused the damage to these appellants occurred prior thereto. The fourth defense was that the flood control act was claimed as being a bar to recovery, and this defense is not applicable because the proximate cause of the damage was the negligent statements of the government officials rather than the flood itself, and further the exceptions to the Federal Tort Claims Act do not include the exception from flood damagent, when there is negligence on the part of a government agent.

ARGUMENT

The officials of the Army Engineers and the officials of the Housing Authority of Portland were negligent in giving false assurance of safety to the appellants. This negligence on the part of these officials was the proximate cause of the damage suffered by the appellants.

(Points to be urged under this heading: 1, 2, 5, 8, 11, 13 and 15 of the above statement of points.)

These cases were instituted under the provisions of the Tort Claims Act of the United States, as amended, under which the United States is liable for injury or loss of property (and for damages in the death cases) caused by the wrongful act or omission of employees of the government while acting in the scope of their office or employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred.

An employee of the government includes officers or employes of any federal agency, and persons acting in behalf of a federal agency, in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

The United States is liable in the same manner and to the same extent as a private individual under like circumstances.

Under the agreed facts as set forth in the pre-trial order, the acts and omissions occurred and the loss of life and property was sustained within the state of Oregon.

Our inquiry, therefore, is properly and necessarily directed to the applicable law of the State of Oregon.

Preliminary to discussion of the substantive law of Oregon, mention should be made of the management situation at Vanport at the time of its inundation. The record shows the fee simple ownership by the United States of Vanport and its rental units. Operating details such as collecting rents, hiring janitors and the like were

being handled immediately by Housing Authority of Portland (HAP) under a management contract (Defendant's Exhibits 50 et sec), between HAP and Federal Public Housing Administration.

The interposition of HAP does not in any way insulate the United States from liability. We here call the Court's attention to the case of Maryland vs. Manor etc. Co. (Ct. of Ap. 4th Circuit, 1949), 176 Fed. (2d) 414. In this case the United States by Federal Public Housing Administration had leased a row of dwellings for housing for defense workers during the war. After the close of hostilities FPHA subleased to a private individual who assigned his lease to a private corporation. A tenant, bitten by an infected rat in the dwellings, died of endemic typhus.

In an action for wrongful death, the United States contended that it was insulated from liability because of its leases, but the court disapproved of this contention in this language:

> "The defendant also contends that it is relieved from liability under the Federal Tort Claims Act, 28 U.S.C.A. § 1346 (b), because the jurisdiction of the District Courts to entertain actions on claims against the United States for injury to property of persons is limited by the statute to negligent or wrongful acts or omissions of an employee of the government acting within the scope of his employment, and an employee is defined in 28 U.S.C.A. § 2671 as a person acting on behalf of the federal agency in an official capacity. It is said that Dugan was in complete charge of the management of the property as an independent contractor and hence Anderson's death was not caused by the negligent act or omission of any employee of the government.

> There is no substance in this contention because the evidence shows that Dugan was subject to the *detailed supervision* of the Public Housing Authority, and that in his contract for the management of the property, he agreed to *be bound by the regulations* issued by the government *in the form of a contract managers' manual,* and by all amendments thereto." (Emphasis supplied.)

In these Vanport cases, the United States was not a mere temporary lesse of the premises, but was the owner in fee of the dwellings, was requiring that its property be managed and operated in accordance with its regulations and the directions of its Managers' Manual, and was dictating the policy as to the kind of persons permitted to occupy its premises, and was directly benefitting from the income.

The decision of Judge Fee in the trial court confirmed the fact that HAP was an agency of the United States, Opinion 109 Fed. Supp. at page 223, and cases cited in note 27 on said page.

We now proceed to a consideration of the substantive Oregon law.

The trial court held, and properly, that the Oregon law is well settled in accordance with common law principle that a landlord has certain definite obligations to a tenant and that the landlord is liable for damage to the property of a tenant caused by negligence of the landlord as to portions of the property over which he retains control, or for negligent maintenance or use of portions of the leased property used by the tenants in common, 109 Fed. Supp. p. 224.

In support of this statement the trial court, in a note, directed attention to the case of Longbotham vs. Takeoka, 115 Or. 608, 239 Pac. 105, 43 A.L.R. 1285, in which case a tenant suffered damage to his goods because the landlord allowed drains to become clogged and rain water invaded the leased premises. In this case the Court said (115 Or. 615-6) that the general rule that the landlord is not bound to repair is not applicable where negligent management of his property not included in the leased portion damages the goods of the tenant, and that, 'In this connection it is believed that a landlord cannot wilfully or negligently burn out or drown out his tenant without being responsible in damages."

Senner vs. Danewolf, 139 Or. 93, 293 Pac. 599, 6 Pac. (2d) 240, was also referred to. This case holds that a landlord is liable to the guests or invitees of his tenants upon the demised premises by reason of a dangerous condition of the premises of which the injured guest or invitee was ignorant. In this case the Court said that the dangerous condition had been brought about and was entirely produced by the landlord, who consequently remains liable for injuries to persons lawfully on the premises, and that if a landlord is guilty of negligence or other wrong which leads directly to the injuries complained of, he is liable.

The trial court refers also to Staples vs. Senders, 164 Or. 244, 96 Pac. (2d) 215, 101 Pac. (2d) 232, in which, in speaking of an owner's liability for personal injuries due to the condition of the premises sustained by an invitee or a tenant, the Oregon Court used the following

language (164 Or. p. 263):

> "As to defects in the leased premises existing at the time of the demise it is generally held that even then the landlord is not liable for injuries caused by them to his tenant, or one standing in the tenant's right, unless they are so hidden that the lessor could be regarded as under an obligation to notify the lessee of their existence. 1 Tiffany, *ibid,* 563, § 86d, 649, § 96a; 16 R.C.L., *ibid.* 1068, § 588; 36 C.J., *ibid,* 204, § 874. It has been held in this state, however, that where the landlord creates a nuisance upon his premises and then demises them, and an invitee of the lessee is injured as the result, the landlord remains liable for the consequences of the nuisance as the creator thereof, notwithstanding, apparently, that the dangerous condition was known to the lessee as well as to the landlord: *Senner v. Danewolf,* supra; see 16 R.C.L., *ibid,* 1069, § 589."

In addition to these authorities, we direct attention to the case of Garrett vs. Eugene Medical Center, 190 Or. 117, 224 Pac. (2d) 563. This was a case in which the plaintiff, a tenant, recovered for injuries sustained because of unsafe condition of premises leased from defendant. At 190 Or. 127 appears the following statement:

> "In *Pritchard v. Terrill,* decided October 3, 1950, 222 P. 2d 652. *Lyons v. Lich,* 145 Or. 606, 28 P. 2d 872, *Massor v. Yates,* 137 Or. 569, 3 P. 2d 784, and *Longbotham v. Takeoka,* 115 Or. 608, 239 P. 105, the landlord had retained at least partial control over the part of the premises which, upon becoming defective, caused injury. In all instances, judgment for the plaintiff was affirmed."

In Restatement of the Law in the volume on Torts, Section 361, it is stated:

> "A possessor of land, who leases a part thereof and retains in his own control any other part which is

necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care (a) could have discovered the condition and the risk involved therein, and (b) could have made the condition safe. Comment: a. The rule stated in this Section applies irrespective of whether the lessee or his licensees coming in his right upon that part of the land leased to him, know or could, by the exercise of reasonable care, discover the dangerous condition maintained by the lessor upon that part of the land maintained within his own control."

In Dalehite vs. United States, ... U.S. ....., 73 S. Ct. 956, decided June 8, 1953, the Supreme Court of the United States divided 4 to 3 upon the question of the liability of the United States under this act for damages sustained as a result of the explosions occurring at Texas City, Texas, on April 16 and 17, 1947. The majority opinion says that the Federal Tort Claims Act was an off-spring of a feeling that the government should assume the obligation to pay damages for the misfeasence of employees in carrying out the government's work. It says further that the Act is to be invoked only on a negligent or wrongful act or omission of an employee and requires a negligent act, and liability does not arise solely by virtue either of the ownership by the United States of an inherently dangerous commodity or property, or of its engaging in an extra hazardous activity.

Accepting as we must this statement of the applicability of the Federal Tort Claims Act, we eliminate

from discussion in this brief the well-known doctrine of absolute liability which had been imposed by Judge Fee upon the United States in the leading case of Ure vs. United States, 93 Fed. Supp. 779, and which was urged by these appellants before Judge Fee as a ground of liability in these cases, and base our case upon the negligence of employees of the government.

The negligence of the employees of the government, while acting within the scope of their employment. consisted in giving to these appellants, carelessly under the existing circumstances, unwarranted assurances of the safety of their lives and property.

In 65 C.J.S. at page 428 the rule respecting liability for false statements negligently given is stated as follows:

> "A false statement negligently made may be the basis of a recovery of damages for injury or loss sustained in consequence of a reliance thereon, the American rule in this respect being more liberal than the law in England. In order that such liability may exist, it is necessary that the relationship of the parties, arising out of contract or otherwise, be such that one has the right to rely on the other for information, that the one giving the information should owe to the other a duty to give it with care, that the person giving the information should have, or be chargeable with, knowledge that the information is desired for a serious purpose, that the person to whom such information is given intends to rely and act on it, and that if the information is erroneous, the person to whom it is given will be likely to be injured in person or in property as a result of acting thereon."

In Restatement of the Law, Torts, at page 840 appears the following:

> "§ 310. Conscious misrepresentation involving risk of bodily harm. An actor who makes a misrepresentation of fact or law is subject to liability to another for bodily harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other or a third person which involves an unreasonable risk of bodily harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes."

Under Comment (b) under this section of Restatement it is stated that this rule is applicable to misrepresentations upon which the safety of the person or property of another depends, and the following illustration is given:

> "A tells B that he has tried the ice on a certain pond and found it thick enough for safe skating knowing that he has not tried it and knowing nothing of the condition of the ice, which in fact is dangerously thin although not so appearing. B, in reliance on A's statement, attempts to skate upon the pond and falls in, catching a severe cold. A is liable to B."

The evidence clearly shows that the Army Engineers assured the officials of Housing Authority of Portland concerning the safety of the premises and also that the officials of Housing Authority of Portland, on their own volition, advised the tenants of Vanport concerning their safety, upon which the tenants, including the appellants, relied and acted.

Under the Oregon law the landlord is not only under the duty of keeping the premises reasonably safe, but also of giving suitable warning to the tenants and invitees.

In Massey vs. Seller, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553, an action in tort arising because of alleged negligence in maintaining an elevator shaft, the Court said (45 Or. p. 271):

> "It may be assumed that it was the duty of the defendants to warn plaintiff of the danger or apprise him of the unguarded elevator shaft when inducing him to enter the shipping room to make the exchange or transfer of the fruit jars, that it was a duty they owed him, and that they were negligent in the nonobservance of it."

Boardman vs. Ottinger, 161 Or. 202, 88 P. (2d) 967, was an action against the defendants, doing business as Jackson Hot Springs, to recover for injuries sustained while plaintiff was a patron in the premises of the defendants. In speaking of the necessary warning the Court said (161 Or. pp. 206-7):

> "From the Restatement of the Law of Torts, § 348, we quote:
>
> 'public utility or other possessor of land who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the land for such a purpose for bodily harm caused to them by the accidental, negligent or intentionally harmful acts of third persons or animals if the possessor by the exercise of reasonable care could have (a) discovered that such acts were being done or were about to be done, and (b) protected the members of the public by (i) controlling the conduct of the third persons, or (ii) *giving a warning adequate to enable them to avoid the harm* without relinquishing any of the services which they are entitled to receive from the public utility.'
>
> "That statement is in accord with our decisions: *Peck v. Gerber,* 154 Or. 126, 59 P. (2d) 675, 106

A.L.R. 996; and *Hill v. Merrick,* 147 Or. 244, 31 P. (2d) 663. See also *Curtis v. Portland Baseball Club,* 130 Or. 93, 279 P. 277, and *Johnson v. Hot Springs Land & Imp. Co.,* 76 Or. 333, 148 P. 1137, L.R.A. 1915F, 689.

"Accordingly, since the defendants owed the above duty, their argument concerning a responsible, independent agency (by which term they refer to the ballplayers) is without merit, for it was their duty to protect the plaintiff against injury from such an agency if, through the exercise of reasonable care, they could have discovered the wrongful conduct and taken the appropriate course."

Briefly, the pertinent facts involved regarding the situation at the time are these:

There were 16,000 people living within the boundaries of Vanport.

Vanport, together with all the buildings thereon, was owned in fee simple by the government and was being maintained and operated by the government, and the government was in the possession and control and receiving the rentals the same as any other private landlord.

On May 30, 1948, flood waters of the Columbia River, to a depth of 29.6 feet above mean high water, were pressing against the north and south dikes and against the western railroad fill; this was the highest water that had ever been against any of the dikes, and they were all leaking badly; the situation was recognized as so serious that the Army Engineers and Housing Authority of Portland were patrolling, sandbagging and trying to keep track of the dangerous conditions as they

continued to increase; the Red Cross, the sheriff's office, the Oregon State authorities and the railroad officials were seriously concerned about the safety of the people residing in Vanport; it is unquestioned that the situation was dangerous, as is graphically shown by the remarks of the trial judge during the course of the trial during the cross-examination of Mr. Taylor, who was Assistant Director of Management of HAP and in charge of patrolling the dikes:

> "THE COURT: If nobody told you Vanport was in danger, what was this seriousness of the situation that was discussed at the meeting?
>
> . . .
>
> THE COURT: Nobody had told you that Vanport was in danger with 30 feet of water around it, did they?"

There is no question whatever but that the Army Engineers and the officials of HAP were utterly and completely ignorant and uninformed with respect to the foundation, composition, interior filling, structural strength and general stability of the western embankment, generally referred to in the evidence as the railroad fill. The western embankment, according to the agreed facts, was not built by the railroad companies to be, and was never designed from an engineering point of view as, a water repellent structure, but was simply a support for the railroad tracks. Apparently this agreed fact was not taken into consideration by the Army Engineers or by the officials of HAP at the time the water was cresting at an expected elevation of 32 feet surrounding Vanport.

Yet, on the several days prior to the break in this western embankment, the officials of the Army Engineers and the officials of HAP repeatedly assured these appellants and other residents of Vanport of their safety. This assurance was by radio release, by releases to newspapers, by telephonic responses to inquires through the central switchboard and by all the other generally recognized means of communication.

Reference has heretofore been made in the statement to the pages of the transcript and to the exhibits substantiating these communications and unwarranted assurances of safety. We direct the Court's attention at this point, however, to the following:

The Oregon Journal of May 28, 1948, quoted the Army Engineers as stating:

> "There is nothing at present to indicate that the dikes will not hold, but every precaution is being taken."

The Oregon Journal of May 29, 1948, contained the heading:

> "Uneasy Folk Assured Area Safe,"

and the further statement

> "The Columbia River's expected crest of 30 feet will not endanger Vanport City, according to Harry D. Jaeger, General Manager . . . The protecting dikes around Vanport City area are a full 33 feet high and are ample to protect the community of approximately 25,000."

The Sunday morning, May 30, 1948, Oregon Journal contained, among others, the following:

> "Residents of Vanport City have been reassured that no danger exists for them."

In another column this paper said:

> "No Vanport danger but preparations made—'in case'—While Col. O. E. Walsh, District Army Engineer, gave reassurances Saturday afternoon that Vanport City is in no danger from flood waters, . . ."

The Oregonian, May 29, 1948, contained this statement:

> "Neither is Vanport City in any foreseeable danger from a 30 foot flood crest, Harry D. Jaeger, General Manager, declared Friday, in an effort to quiet fears for that locality."

In the Sunday morning Oregonian, May 30, 1948, appeared the following:

> " 'The Engineers have assured us our protection is adequate at the present flood prediction,' Jaeger said. 'We feel that there is no cause for worry, but we are not overlooking what might occur. We have made plans with the American Red Cross for quick evacuation of Vanport if the river goes higher than expected.' "

In addition to the responses which the telephonic operators were instructed to make, assuring the residents of Vanport of their safety, the radios in their news broadcasts and other items carried the assurances of the Army Engineers and the officials of HAP as to the safety of the Vanport residents.

Late Saturday, May 29, 1948, the Housing Authority of Portland prepared and had placed early Sunday morning in each and every apartment the following mimeographed bulletin:

> "TO THE RESIDENTS OF VANPORT
> Read this carefully and keep it in case you need to refer to it.

The flood situation has not changed since the prediction made last Thursday that the highest water would come next Tuesday, that the dikes were high enough and strong enough to withstand the crest, and that barring unforseen developments VANPORT is safe.

However, the Housing Authority is taking every possible precaution to protect the personal safety of every Vanport resident in the event of emergency. The plan outlined is as follows:

1. In the event it becomes necessary to evacuate Vanport, the Housing Authority will give the warning at the *earliest possible moment,* upon the advice of the U. S. Army Engineers. Warning will be by siren and air horn blown continuously.

2. Sound trucks will give instructions on what to do. Those instructions briefly are as follows:

A. Don't get panicky! You have plenty of time. Take such valuables as money, papers, jewelry. Wear serviceable clothing, and pack essential personal belongings and a change of clothing in a small bag. *Do not try to take too much.* Turn off lights, stoves, close windows, lock the door.

B. If you have a car, observe traffic regulations. Carry as many people as you can.

C. If you haven't a car go toward DENVER AVENUE, or the RAILROAD EMBANKMENT, which ever is closest. Portland Traction buses will operate in the project or on Denver Avenue, depending on conditions, to take persons to places of emergency shelter. Upon arrival at shelter, the Red Cross will assume responsibility for registration and for emergency food, shelter, and clothing. The county health department will provide emergency medical care. Cases of sickness, old age, or disability where special assistance will be necessary in case of evacuation should be reported now to the Sheriff's Office. Such cases, if they can conveniently do so,

are encouraged to leave Vanport now for the next few days.

Also persons who *for any reason* are leaving Vanport to be away for several days are urged to register at the Sheriff's Office before leaving. This will help to answer inquiries from anxious friends and relatives who do not know where you are.

REMEMBER:
DIKES ARE SAFE AT PRESENT
YOU WILL BE WARNED IF NECESSARY
YOU WILL HAVE TIME TO LEAVE
DON'T GET EXCITED!"

Nevertheless, shortly after 4:00 P.M. on Sunday, May, 30, 1948, this railroad fill, of the nature, structure and contents of which the Army Engineers and the officials of the Housing Authority of Portland had no knowledge or concerning which they made no investigation, disintegrated, and Vanport was inundated and the household goods, belongings and effects of these appellants were irretrievably lost.

The trial court in its opinion has correctly stated that under the law of Oregon there are three prerequisites for recovery against a private person. There must have been (1) a duty incumbent upon the defendant, (2) a breach of that duty by defendant, and (3) injury and damage resulting proximately from the breach of duty. (109 Fed. Supp. at p. 218).

We have demonstrated, both from the opinion in this case (109 Fed. Supp. p. 224) and from the several Oregon cases, that the United States as owner of these premises and as the landlord of these appellants owed the duty to them not to drown them out and to give

them warning; and we have demonstrated that instead of giving warning, the officers and agencies of the United States recklessly and without knowledge of the stability of the railroad fill gave unwarranted assurances of safety; and of course the loss and damage was admitted, except (as to any appellant) as to the exact amount.

The trial court was consequently in error in determining that the government was not liable to these appellants.

The United States, in its capacity as the landlord of the appellants, and by its retaining control of the area in question, owed a duty to its tenants, including the appellants, to keep the area in question safe, or at least not to mislead the appellants as to safety, and further the United States acting through the Army Engineers and Housing Authority of Portland assumed this duty, which they failed to perform.

(Points to be urged under this heading: 3, 6 and 7 of the above statement of points.)

In the opinion of the trial court there appears this statement or finding (109 Fed. Supp. 222):

> "Since its agents took no care to assure themselves of the composition and structure of the western dike which broke, it is urged negligence was proven."

Standing by itself and in the absence of other circumstances, failure of the Army Engineers at a time of high water to determine the composition of a railroad fill with the view of determining whether the fill could

be relied upon as a dike or water repellent structure certainly would not constitute negligence.

The fundamental error of the trial court, however, lies in failing to consider the entire legal and physical situation as one integrated whole. Throughout the opinion an individual segment of the situation is discussed as though it had no relationship with the other segments.

But we are concerned with all of the facts as one integrated whole. The finding that the agents of the United States took no care to assure themselves of the composition and structure of the western dike which broke must necessarily be coupled and considered with the other fact, that then and there the United States was providing presumably safe housing accommodations for these appellants and was collecting their money and was assuming to advise and protect them. The description by Judge Fee of this assumption cannot be improved on (109 Fed. Supp. p. 225). After referring to the administrative and executive employees of Housing Authority of Portland, the Judge stated:

> "The chief criticism which can be directed at this group was that they assumed to be omniscient and radiated an atmosphere of confidence which the situation did not justify. Instead of directing the tenants to do their own thinking and decide on their own what the safety of their families and themselves required, they did indicate that the kind, paternalistic government would take complete direction of its children and protect them.
>
> "In this these individuals were not entirely blamable. There was a large file of directives from the national capitol sent to all the housing projects in the country, including Vanport, which burningly

> reflected the same attitude. The thesis seems to be that the people in housing projects are like children; they really do not know what they want or what to believe; if they were adult thinkers, they would wish and desire those things which are best for them; since they do not know what the things which are best for them are, the designated managers of the housing project should accept the challenge and give them guidance and directions, all in accordance with the mandates from above, contained in the housing regulations."

Attention has heretofore been directed to the unwarranted assurances of safety and many of the details thereof.

The complete lack of knowledge of the composition and stability of the western embankment, and the ownership, maintenance and control of Vanport and its buildings, and the paternalistic assumption of the care and safety of these appellants, and the unwarranted assurances of safety, and the ensuing loss to these appellants, are all elements making one entire situation, and no one element can be divorced from the remainder in a determination of the proper outcome of this litigation.

In divorcing each element from each other element, the trial court committed a fundamental error.

A further error of the trial court lies in the conception of this series of cases as sounding in contract. It is surprising that this concept should run through the opinion, but it does. It is stated (109 Fd. Supp. 225) that a person owning a house in an exposed locality takes the same risk as a tenant would had the tenant been owner, and that there is no protection against flood except by taking

out a contract of insurance. Again it is stated (109 Fed. Supp. 226) that the "Good Samaritan" doctrine is the doctrine of "contract clause in the leases." Again it is stated that there "is here no contract or guarantee."

The appellants in these cases do not rely upon any provision of their leases with the United States, nor upon any insurance policies which the United States may have issued or procured, and this matter is not one of contract in any respect whatsoever. There was a duty under the law of the State of Oregon, and that duty was breached by employees of the government in the negligent and unwarranted assurances to these appellants, and as a proximate result they sustained their losses.

And that in short is the case of the appellants.

The doctrine of res ipsa loquitur applies in this case.

(Points to be urged under this heading: 4 and 12 of the above statement of points.)

The trial court found that the seizure of the properties of the S. P. & S. Railway Company and the Union Pacific Railway Company, which included the western embankment which failed, was the fiction of the flimsiest kind and that the seizure did not in fact affect in any way the ownership or control of the said railways or their properties, including the western embankment that failed. The appellants assert that this finding by the trial court was in error.

It was stipulated in the pre-trial order that the President of the United States issued Executive Order num-

ber 9957, effective as of noon on May 10, 1948, the date of said order (P.O. 75, 79). This Executive Order provided that the possession, control and operation of the transportation system listed in said order, including the railroad companies which owned the embankments in question, were taken over by the United States on May 10, 1948, through the Secretary of the Army. This order further provided that at the time of said taking, all properties under the order, which included the embankment which failed, shall be conclusively deemed to be within the possession and control of the United States without further act or notice (13 F.R. 2503).

Under this Executive Order of the President of the United States, the western embankment that failed was in the exclusive possession and control of the United States at the time of the failure.

The trial court further found that the doctrine of res ipsa loquitur did not apply in this case and the appellants urge that this finding by the trial court was an error.

Referring first to the western embankment that failed, the facts which bring the instant case within the doctrine of res ipsa loquitur are, briefly, that the western embankment, by reason of the Executive Order, was in the exclusive possession and control of the appellee. Further, the occurrence was such as in the ordinary course of things would not happen if those who had its control or management used proper care. Further, there was no participation on the part of the appellants, and the appellants suffered damages. All of the essential elements

of the doctrine of res ipsa loquitur appeared in the facts of this case. 38 Am. Jur., pp. 989-992. An additional element in this case is the fact that the appellee did not at the trial give any reasonable explanation for the cause. As a matter of fact, the district engineer, General Walsh, who was in charge of the district at the time of the break, testified that he did not know or have any opinion as to why the railroad fill failed.

The contentions of the United States in this case, with respect to the railroad fill might have been lifted from the contentions of the defendant in *Suko v. Northwestern Ice Co.,* 166 Or. 557, 113 P. (2d) 209, where a water tank burst damaging plaintiff, and where the defendant argued in support of motions for non-suit and directed verdict that "the evidence fails to disclose any negligence attributable to it in connection with the bursting of the tank. It further asserts that if any negligence was proved it was referrable to the original construction of the tank."

The Supreme Court of Oregon found that the premises on which the tank was located was in the exclusive possession and control of the defendant, brushed aside the contentions of the defendant, and stated that the liability of the defendant did not depend on negligence in construction, but upon negligence in not keeping the water confined. That the negligence was proved by the bursting of the tank and that the rule of res ipsa loquitur applied.

In *Gow v. Multnomah Hotel, Inc.,* 191 Or. 45, 224 P. (2d) 552, 228 P. (2d) 791, decided in 1951, the Supreme

Court of Oregon laid down the general rule that this doctrine is as stated in Am. Jur., supra. Under this decision the law in Oregon is that the rule, when applicable, gives rise to an inference of negligence.

So far under this point we have discussed the doctrine of res ipsa loquitur being applied as to the breaking of the dike itself. The appellants urge that this same rule applies to the negligence of the officers of the Housing Authority of Portland and the United States Army Engineers in giving information as to the safety of the dike in question. It is admitted that the information given by the officials of the appellee was wrong in that the dike did fail. The giving of this information was in the sole control of the agents of the appellee. There certainly was no participation in the giving of this information on the part of the appellants. There can be no argument but what the appellants suffered damages by reason of this wrong information being given by the officers and officials of the appellee. Under the doctrine of res ipsa loquitur the appellee should have given some explanation for these misstatements but none was forthcoming during the trial of this action.

In the trial of this cause the appellee asserted the defenses of assumption of risk by the appellants, that the cause of the damage was an act of God, that the acts of the agents and employees of the United States were done in a period of public emergency and that the provisions of 33 U.S.C.A. 702 (c) apply to the issues involved in this action. None of these defenses, although adopted by the trial court, are tenable.

(Points to be urged under this heading: 9, 10, 14, 16 and 17 of the above statement of points.)

The appellants urge that the District Court committed an error when it found that the appellants assumed the risk that they might be damaged by flood waters and that as a consequence there was no liability on the part of the United States. It is recognized that one who voluntarily assumes the risk of injury or damage from a known danger is barred from recovery. This principle is recognized in negligence cases. However, before this principle applies, the danger must be known. The appellants in this case did not have knowledge of the danger; that is, they did not have knowledge or any reason to believe that the dike would break. They had been advised by their landlord, the United States of America acting through the officials of the Army Engineers and the officials of the Housing Authority of Portland, that the dikes were being carefully watched and supervised and that if any dangers did appear, they would receive an ample warning. These appellants acted as reasonable men in relying upon the advice given to them by the United States. These appellants had no reason whatsoever to believe that the Army Engineers saw fit to say that a structure, in this case the embankment that failed, was safe, when as a matter of fact that opinion was given without any knowledge whatsoever as to the actual condition of the embankment that failed (38 Am. Jur. p. 845.)

This same defense was raised in the case of *State of Maryland v. Manor Real Estate and Trust Company,* 176 F. (2d) 414, U.S.C.A. 4, decided August 2, 1949.

This was a suit under the Federal Tort Claims Act, and the court answered this defense at page 418, as follows:

> "The defendant also contends that recovery must be denied because the deceased assumed the risk of injury when he remained in the apartment after he discovered that the cellars were overrun with rats. Reliance is placed upon such decisions as Thompson v. Clemens, 96 Md. 196, 53 A. 919, 60 L.R.A. 580, where it was held that a landlord who has agreed to make repairs to leased premises, which are not apparently urgent and who has no reason to suppose a serious injury will result from his failure to make them, is not liable to respond in damages for personal injuries sustained by the tenant in consequence of the failure to repair; and that the tenant of such a landlord who is aware that the leased premises are in dangerous condition and chooses to remain on the premises and suffers an injury from the defect, would ordinarily be guilty of contributory negligence, barring recovery. That ruling, however, is not pertinent in this case. The Andersons were not entirely free to leave the premises because of the difficulty of obtaining living accommodations in 1946 which the Authority's enterprise on North Calvert Street was designed to alleviate. Moreover, there is no evidence that the Andersons were aware of the danger of typhus infection from the rat infested premises, but on the contrary there was positive evidence that Mrs. Anderson was not aware of this risk until her husband was taken sick. The tenants were entitled to exercise the right of occupancy conferred by their lease and to demand that the landlord perform the duty of keeping the reserved portion of the premises in safe condition for their use. Under these circumstances, there was no assumption of the risk on their part. See, Restatement of Torts, § 893."

The appellants further urge that the trial court committed an additional error in finding and holding that

the cause of the appellants' damage was an Act of God. The first fallacy in this finding is that the actual cause of the appellants' damage was the negligence of the officials of the Army Engineers and of the officials of the Housing Authority of Portland, when they informed these appellants that all the dikes, including the one that broke, were safe, and wouldn't break. If instead of so informing these appellants, these officials being agents of the appellee had informed that appellants that as far as the western embankment, which failed, was concerned they had no knowledge whatsoever as to the materials used in the construction of the same; they had no knowledge whatsoever as to the nature of the bottom upon which the fill was constructed; they had no information whatsoever as to the manner of construction, but that all they did know was the size of the embankment, and the fact that it had been there since around 1918. Further, that the embankment as far as experience was concerned had only withstood water pressure from the depth of 27.7 feet, and the depth of the water it was going to have to withstand was 3.1 feet higher. If these appellants had received this accurate information instead of the wrong information, which they did receive from the agents of the appellee, in all probability these appellants would have removed their property and would not have suffered the damages of which they are complaining. This giving of wrong information is clearly not an Act of God, but is a negligent act of agents of the appellee.

An Act of God is an unusual, extraordinary, sudden, and unexpected manifestation of the forces of nature,

which man cannot resist (38 Am. Jur. page 649). The high water in the instant case was forseeable and had been predicted by other agents of the appellee, namely, the United States Weather Bureau (P.O. 53). Further, the Columbia River had on prior occasions reached higher elevations, namely, in 1876 and 1894 (P.O. 55). Something which has occurred previously is in all probability likely to occur again and therefore is forseeable.

The defense of Act of God is not tenable. It is recognized, and it is a general rule, that when the negligence of a person concurs with an ordinary flood, storm or other natural force, or with a so-called Act of God, and causing damage, the party guilty of such negligence will be held liable for the injurious consequences, if the damage would not have happened except for that person's failure to exercise care (38 Am. Jur. 719). In this case we do have the Columbia River reaching a high stage, although it had reached higher stages before, but we have coupled with the high water the negligent statements of agents and employees of the appellee, and under the general rule just stated, removes any possible defense of a so-called Act of God.

The appellants further urge that the trial court committed error in finding that the agents and employees of the United States, during the flood period, were acting in a period of public emergency and were exercising their discretion in that connection, and that there would be no liability for negligence by the government officials while acting under a public emergency. This defense is very easily answered in that the actual emergency arose when the embankment failed and the negligent acts by the

employees and agents of the appellee were prior to the public emergency. These acts being the giving of wrong information, not founded upon fact, and not taking steps to investigate the dike in question, or to strengthen the dike so it would withstand the pressure applied to it.

The appellants further urge that the trial court committed error in finding that the Flood Control Act, namely, 33 U.S.C.A. 702 (c) applied to the facts of this case, and thus prevented recovery by these appellants. This section, relied upon by the court, appeared in the Flood Control Act of 1928 (45 Stat. 534). This same provision was retained by Section 8 of the 1936 Flood Control Statute (49 Stat. 1570, 1596).

The Federal Tort Claims Act, under which these actions have been brought, was passed in 1946, 28 U.S.C.A. 1346 (b), 2680. The last quoted section being the so-called exceptions to the Federal Tort Claims Act. In the exceptions there is no provision for excepting damages by reason of a flood and the Federal Tort Act was passed subsequent to the flood statute relied upon by the court. It is interesting to note that in the latest expression by the Supreme Court of the United States, in the case of *Dalehite v. United States,* ..... U.S. ..... , 73 S. Ct. 956, decided June 8, 1953, that the Supreme Court in its majority opinion discusses the exceptions to the Federal Tort Act and calls particular attention to one paragraph in the Committee Reports, being cited in Note 21 of said opinion, and this Committte Report states, in referring to the exemption of a discretionary act or function, that this is a highly important exception intended to preculde any possibility that the Tort Claims Act

might be construed to authorize suit for damages against the government growing out of an authorized activity such as a flood control or irrigation project, where no negligence on the part of any government agent is shown. This Committee Report shows conclusively that it was the intent of Congress that if there was negligence on the part of a government agent, in connection with a flood control project, then the exception would not apply and the government would be liable.

Another conclusive reason why the provision of the Flood Control Act, relied upon by the trial court, does not apply to the instant case, is that the actual cause of the damage to these appellants was not for damage from the flood but their damage resulted from the negligent statements made by the agents and employees of the appellee.

For the reasons given above, none of these defenses urged by the appellee and adopted by the trial court as being a bar to recovery by these appellants, are well founded in law or fact in the instant cases.

CONCLUSION

The judgment of the District Court is wrong and should be reversed.

Dated this 12th day of October, 1953.

Respectfully submitted,

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APPENDIX

28 U.S.C.A., §1291.

The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C.A., § 1346(b).

Subject to the Provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A., § 2401 (b).

A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of

enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

28 U.S.C.A., § 2671.

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency, in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C.A., § 2680.

The provisions of this chapter and Section 1346 (b) of this title shall not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company.